

1 **FOR APPELLEE:**

2 PAUL F. STRAIN (with David J.
3 Heubeck, Venable LLP, Baltimore,
4 Maryland, Theodore V.H. Mayer,
5 William J. Beausoleil, Hughes
6 Hubbard & Reed LLP, New York,
7 New York, John H. Beisner,
8 Jessica D. Miller, Skadden Arps
9 Slate Meagher & Flom LLP,
10 Washington, D.C., on the brief),
11 Venable LLP, Baltimore,
12 Maryland.

13 Appeal from a judgment of the United States District
14 Court for the Southern District of New York (Keenan, J.).

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16 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
17 **AND DECREED** that the judgment of the district court be
18 **VACATED AND REMANDED.**

19
20 Gary J. Douglas appeals from the judgment of the United
21 States District Court for the Southern District of New York
22 (Keenan, J.), imposing sanctions on him for his conduct in
23 delivering his closing argument during a trial in which the
24 plaintiff alleged defective design of Fosamax, a drug
25 manufactured by Merck & Co., Inc. We assume the parties'
26 familiarity with the underlying facts, the procedural
27 history, and the issues presented for review.

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29 The district court described Douglas' closing argument
30 as having been given "in an agitated tone, scuttling about
31 the well of the courtroom, oddly gesturing, singing, and
32 laughing." The court described his style as "aggressive and
33 boisterous," even "manic." Counsel for Merck called it
34 "vaudeville."

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36 After an order to show cause and a hearing, the
37 district court imposed sanctions on the ground that Douglas
38 acted contrary to an earlier ruling that "punitive damages
39 [were] out of the case," when Douglas "insidiously sought to
40 inject [the issue of punitive damages] into the trial during
41 his summation." The court concluded that Douglas' intent
42 could be inferred from his remarks, which included urging
43 the jury to "say something to Merck," and describing Merck's
44 conduct as "reprehensible" and "disgusting."

45
46 A district court has inherent power to impose sanctions
47 if: (1) the challenged claim was without a colorable basis

1 and (2) the claim was brought in bad faith. Wolters Kluwer
2 Fin. Servs., Inc. v. Scivantage, 564 F.3d 110, 114 (2d Cir.
3 2009). “[A] claim is colorable when it has some legal and
4 factual support, considered in light of the reasonable
5 beliefs of the individual making the claim.” Schlaifer
6 Nance & Co. v. Estate of Warhol, 194 F.3d 323, 337 (2d Cir.
7 1999) (internal quotation marks omitted).

8
9 “We review a district court’s decision to impose
10 sanctions under its inherent powers for abuse of discretion.
11 Even under this deferential standard of review, however,
12 this Court must be careful to ensure that any such decision
13 to sanction a[n] . . . attorney is made with restraint and
14 discretion.” Wilson v. Citigroup, N.A., 702 F.3d 720, 723
15 (2d Cir. 2012) (per curiam) (internal citations and
16 quotation marks omitted). “Because the trial court imposing
17 sanctions may act as accuser, fact finder and sentencing
18 judge all in one, our review of such an order is more
19 exacting than under the ordinary abuse-of-discretion
20 standard.” Enmon v. Prospect Capital Corp., 675 F.3d 138,
21 143 (2d Cir. 2012) (internal quotation marks, citations and
22 alterations omitted).

23
24 “Bad faith can be inferred when the actions taken are
25 so completely without merit.” Schlaifer, 194 F.3d at 338
26 (internal quotation marks omitted). But Douglas’ remarks in
27 summation are not self-evidently improper, and the district
28 court did not expressly link these remarks with other
29 behaviors or other factors that might bear upon the issue of
30 bad faith. In short, the district court did not make the
31 requisite “factual findings of bad faith . . . characterized
32 by a high degree of specificity.” Id. For that reason, the
33 record is insufficient to support the requisite review.

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35 For the foregoing reasons, we hereby **VACATE** and **REMAND**
36 the judgment of the district court.

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38 FOR THE COURT:
39 CATHERINE O’HAGAN WOLFE, CLERK
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